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No. 00-1214

IN THE

SUPREME COURT OF THE UNITED STATES

THE STATE OF ALABAMA,

Petitioner,

v.

LEREED SHELTON,

Respondent.

On Writ of Certiorari to the
Supreme Court of Alabama

REPLY BRIEF

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ARGUMENT

In the opening brief, the State of Alabama explained that, for purposes of determining when a defendant has a right to state-appointed counsel, the precedents of this Court have drawn a bright line between "actual imprisonment" and lesser penalties such as fines and the "mere threat" of incarceration. (Petitioner's Brief at 8, 9–15 (discussing *Scott v. Illinois*, 440 U.S. 367, 373 (1979)).) Further, the State established that the majority of federal and state courts, in reliance upon this standard, have concluded that a probationary or suspended sentence does not trigger the right to appointed counsel under the Sixth Amendment. *Id.* at 15–20 Finally, the State argued that rejection of the "actual imprisonment" standard would, without support in the Sixth Amendment or in the decisions of this Court, result in the unwarranted diversion of scarce judicial and public resources. *Id.* at 20–22

Shelton's brief calls none of these conclusions into question. Shelton ignores the underlying facts, including that he "understood his right to *employ* counsel." (Petitioner's Brief at 3 (emphasis added).) Indeed, the Alabama Supreme Court found that Shelton was aware that he could be represented by counsel "if he 'went and paid the money to hire a lawyer.'" App. 32. Despite these facts, Shelton never addresses the plain historical and textual distinction between the core Sixth Amendment right to retain counsel and the right to state-appointed counsel recognized in such decisions as *Gideon v. Wainwright*, 372 U.S. 335 (1963). Shelton chooses instead to acknowledge this distinction in a single footnote, while ignoring its relevance in the body of his argument. (Respondent's Brief at 4 n.1.)

This distinction, however, is critical. The State of Alabama does not seek a ruling declaring that the Sixth

Amendment denies misdemeanor defendants the right to retain counsel, even when they are never incarcerated. Rather, the State asks this Court to affirm its express holding in *Scott* that, unless incarcerated, misdemeanor defendants have no right to *state-appointed* counsel.

As to the contentions raised in Shelton's brief, aside from his novel and improper request that this Court overrule its three well-established precedents defining the limits of the right to appointed counsel, he misconstrues those precedents and the nature of his punishment in this misdemeanor case. Shelton urges this Court to eschew a "literal reading" of its decisions, which limit the right to appointed counsel in misdemeanor cases to those that result in actual imprisonment. (Respondent's Brief at 5.) Shelton then invites this Court to speculate that he will violate the terms of his unsupervised probation and suffer "actual incarceration," when, in fact, no such risk exists. Building on these arguments, Shelton would have this Court depart radically from the language of the Sixth Amendment and hold that the imposition of probation alone gives rise to a right to appointed counsel in a misdemeanor case.

The State of Alabama submits five specific replies to Shelton's arguments. First, Shelton's unsupervised probation does not meet the standard of "actual imprisonment" that triggers the right to appointed counsel. Second, although it is a speculative and premature issue, Shelton clearly will not suffer actual imprisonment through a revocation of his probation, because the trial court may not enforce a sentence of imprisonment unless a defendant has been informed of his right to appointed counsel in the underlying prosecution. The court, of course, can enforce its orders, including the terms of probation, through other means, including its contempt power. Third, Shelton's request

that this Court overrule its well-established and workable precedents is improper. As this Court has held, Shelton is prohibited from seeking reversal of precedent without at least giving some notice of that intention in his opposition to the petition for certiorari. *South Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 170–71 (1999); *see* Sup. Ct. R. 15.2; *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 553 (1999). In his Brief in Opposition, Shelton accepted the continued validity of this precedent. Even if Shelton had timely raised this issue, he fails to provide any persuasive rationale for upending this settled law. Fourth, the pretrial determination whether to appoint counsel protects defendants by enabling incarceration only when appointed counsel is offered; this preliminary assessment does not prejudice a judge in the later exercise of his responsibilities at trial. Fifth, a further departure from the text of the Sixth Amendment would cause Alabama and other states to suffer unwarranted costs for the provision of counsel in misdemeanor cases that result only in suspended sentences or probation, but not in actual imprisonment.

Based on the argument contained in the opening brief and in this Reply brief, the State of Alabama urges this Court to reverse the decision below and adhere to the longstanding rule that the right to appointed counsel in misdemeanor cases exists only when the defendant is actually imprisoned.

I. SHELTON'S UNSUPERVISED PROBATION DOES NOT MEET THE STANDARD OF "ACTUAL IMPRISONMENT" ESTABLISHED IN *ARGERSINGER V. HAMLIN*, *SCOTT V. ILLINOIS*, AND *NICHOLS V. UNITED STATES*.

When first confronted with the application of the Sixth Amendment to misdemeanor cases, this Court ruled that appointed counsel was required only "where imprisonment *actually* occurs." *Argersinger v. Hamlin*, 407 U.S. 25, 38 (1972) (emphasis added). Adhering to that "delimit[ation]" seven years later, this Court distinguished "actual imprisonment" from the imposition of a "fine[] or the mere threat of imprisonment[,] . . . [and] adopt[ed] . . . actual imprisonment as the line defining the constitutional right to appointment of counsel." *Scott v. Illinois*, 440 U.S. 367, 373 (1979). In 1994, this Court reaffirmed that its decision in *Scott* drew "the line . . . [for Sixth Amendment protection] between criminal proceedings that *resulted* in imprisonment and those that did not." *Nichols v. United States*, 511 U.S. 738, 746 (1994) (emphasis added). These well-established precedents limit the right to appointed counsel to misdemeanor defendants in cases of physical incarceration, not, as here, unsupervised probation. Shelton's rejection of a "literal reading" of these cases and his attempt to blur this clear standard lacks merit.

A. The Differentiation Between Actual Imprisonment and the Mere Threat of Incarceration in *Argersinger*, *Scott*, and *Nichols* Establishes That the Imposition of Unsupervised Probation Does Not Require the Appointment of Counsel.

A misdemeanor defendant placed on unsupervised probation suffers neither actual imprisonment nor a deprivation of physical liberty. Under Alabama law, a

trial judge "may suspend execution of [a] sentence [with a term of less than 15 years] and place on probation any person convicted of a crime[.]" ALA. CODE § 15-22-50 (1995). By placing a misdemeanor defendant on probation, the judge "stops . . . execution" of the sentence. *Persall v. State*, 16 So. 2d 332, 334 (Ala. Ct. App. 1944). Indeed, far from undermining an offender's liberty interest, probation *enhances* an offender's liberty by returning him to society. The probationary term is imposed in lieu of imprisonment to "ameliorate the harshness of the law's judgment and give the convict a chance to show that he . . . is a fit subject and may be rehabilitated and become an acceptable citizen." *Ex parte State*, 472 So. 2d 1119, 1121 (Ala. 1985). Likewise, this Court has recognized that probation "is intended to be a means of restoring offenders who are good social risks to society; to afford the unfortunate another opportunity" to live in a free society. *Korematsu v. United States*, 319 U.S. 432, 435 (1943) (internal quotation omitted).

Shelton asserts that a probationary sentence effectively constitutes "actual imprisonment" and erroneously cites *Persall* for the proposition that probation is "a sentence of imprisonment the probationer is merely serving outside the prison walls." (Respondent's Brief at 7.) This argument fails; the *Persall* court expressly distinguished between parole following imprisonment and probation by virtue of a suspended sentence. 16 So. 2d at 334 ("The argument is inapposite that, in this State, a probationer is of the same status as a parolee who, under our parole statute . . . is declared as 'serving outside of prison walls' while on parole, with the result that such period is reckoned as in satisfaction pro tanto of the sentence of imprisonment."). This Court has similarly distinguished actual incarceration from fines and probation, recognizing that the latter do not "approximate in severity the loss of liberty that a prison

term entails. . . . because incarceration is an intrinsically different form of punishment." *Blanton v. City of North Las Vegas*, 489 U.S. 538, 542 (1989) (Sixth Amendment discussed in jury trial context) (internal quotation omitted).

Shelton also ignores the practical application of the probationary statute. An Alabama court, upon granting probation, "suspend[s] execution of [the] sentence" and liberates the defendant, subject to possible imprisonment in the event that the defendant violates the terms of probation. ALA. CODE § 15-22-50; Ala. R. Crim. P. 27.1;[1] Ala. R. Crim. P. 27.6(e);[2] *cf. Hicks v. Feiock*, 485 U.S. 624, 637 (1988) (in explaining that suspension of a sentence and imposition of probation for contempt does not affect its classification as civil or criminal in nature, this Court noted, "[w]hat is true of respondent . . . is also true of any such convicted criminal: *as long as he meets the conditions of his informal probation, he will never enter the jail*[]") (emphasis added). The potential for incarceration lingering under a probationary sentence exists only as "the mere threat of imprisonment" that this Court has squarely held does not trigger a right to appointed counsel.

Shelton erroneously construes the phrase "deprivation of liberty" in *Argersinger* in an expansive manner, and he wrongly contends that the infringement of *any* recognized

[1] The Rules of Criminal Procedure provide additional guidance for the imposition of probation, stating that, "[i]f the sentencing court is given authority to suspend sentence and to place the defendant on probation, the court may impose such conditions and regulations as will promote the probationer's rehabilitation and protect the public." Ala. R. Crim. P. 27.1.

[2] Upon violation of a condition of release, the trial court is authorized to "revoke, modify, or continue probation." Ala. R. Crim. P. 27.6(e).

liberty interest gives rise to a right to appointed counsel. This argument, however, fails to appreciate the *Argersinger* and *Scott* interpretations of "deprivation of liberty" under the Sixth Amendment. As explained in *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 25, 26 (1981) (emphasis added), this Court "has refused to extend the right to appointed counsel to include prosecutions which, though criminal, do not *result* in the defendant's loss of . . . *physical* . . . *liberty*." In *Lassiter*, this Court refused to appoint counsel for an indigent parent in a proceeding to terminate parental status. This Court reviewed its decisions under the Sixth Amendment and wrote that it is only "the defendant's interest in personal freedom" from physical confinement, not any broader liberty interest, "which triggers the right to appointed counsel[.]" *Id.*

The adoption of Shelton's argument would erase any meaningful distinction under the Sixth Amendment between "actual imprisonment" and a fine or probation. Shelton contends he faces the "practical possibility" of incarceration upon revocation of his probationary sentence (Respondent's Brief at 22), but ignores the reality that, until the court's sentencing terms are satisfied, a defendant often faces, at minimum, a threat of imprisonment. Even when a judgment requires only the payment of a fine, with no express provision for imprisonment, the law still often permits incarceration for the willful failure to pay that fine. *See* MODEL PENAL CODE § 302.2 (2000); *Little v. State*, 693 So. 2d 30, 31 (Ala. Crim. App. 1997) (ruling that trial court is authorized to hold misdemeanor defendant in contempt of court for nonpayment of fine, subject to an additional fine and five-day imprisonment). In approving the imposition of a fine backed by a threat of incarceration absent the assistance of counsel, and distinguishing "fines or the mere threat of imprisonment" from "actual imprisonment" in *Scott*, 440

U.S. at 373–74, this Court inherently authorized uncounseled probationary sentences. *See People v. Reichenbach*, 587 N.W.2d 1, 16 (Mich. 1998) ("The plain meaning of the words 'actual imprisonment' dictate the conclusion that defendant's conditional sentence did not constitute 'actual imprisonment.' "); *United States v. Smith*, No. 94-5627, 1995 WL 314892, at *2 (6th Cir. May 23, 1995) (unpublished opinion) ("Nowhere does [this] Court limit its holding to those misdemeanor convictions resulting in fines. Logically speaking, the 'mere threat of imprisonment' can only be read to include suspended sentences."), *cert. denied*, 516 U.S. 897 (1995).

B. In *Argersinger* and *Scott*, this Court Judged the Necessity of Counsel Based on the Final Disposition of the Case.

Shelton misconstrues *Argersinger* and *Scott* to mean that the "mere threat of imprisonment" refers only to a *pretrial* threat. (Respondent's Brief at 7.) The *Argersinger* Court held, however, that the right to appointed counsel under the Sixth Amendment extends only to misdemeanors that "*end up* in the actual deprivation of a person's liberty." 407 U.S. at 40 (emphasis added). The *Argersinger* Court considered and rejected Argersinger's and amicus curiae's arguments that the right to appointed counsel should pertain to any case where imprisonment was an authorized penalty. *Scott*, 440 U.S. at 374 n.4. Adopting *Argersinger*'s "actual deprivation" standard and refusing to "extrapolate [that] already extended line[,]" *id.* at 372, the *Scott* Court also rejected an "authorized penalty" argument. The *Scott* Court explained that *Argersinger* was founded on the "conclusion that incarceration was so severe a sanction that it should not be imposed as a *result of* a criminal trial unless an indigent defendant had been offered appointed counsel." *Id.* at 372–73 (emphasis added). At the end of a

trial, "actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment." *Id.* at 373.

II. ALTHOUGH IT IS A SPECULATIVE AND PREMATURE ISSUE, SHELTON WILL NOT SUFFER "ACTUAL IMPRISONMENT" THROUGH A REVOCATION OF HIS PROBATION BECAUSE THE TRIAL COURT CAN ENFORCE ITS ORDERS BY OTHER MEANS INCLUDING ITS CONTEMPT POWER.

Despite Shelton's suggestion to the contrary, the State of Alabama and its amici do not argue — "tacitly" or otherwise — that probation can be revoked and incarceration actually imposed regardless of whether an offender was informed of his right to appointed counsel. (Respondent's Brief at 17.) To the contrary, the State and its amici accept that, under *Argersinger* and *Scott*, a defendant cannot be actually incarcerated unless he was properly informed of his right to appointed counsel. Accordingly, there is no possibility that Shelton's suspended sentence will be activated if he violates the terms of his probation. Alabama trial courts are presumed to know the law and are aware of the prohibition against incarceration absent assistance of counsel. *See Sochor v. Florida*, 504 U.S. 527, 537 (1992) (when considering heinousness as an aggravating factor for a capital sentence, the reviewing court must "presume the trial judge to have been familiar with [the] body of case law"); *Strickland v. Washington*, 446 U.S. 668, 694 (1984) (in evaluating the prejudice element of an ineffective assistance of counsel claim, "a court should presume . . . that the judge . . . acted according to law").

Shelton's use of statistical information to support his argument that misdemeanor defendants placed on probation face a significant risk of imprisonment is equally unpersuasive. As Shelton concedes, his statistics "do not show the number or percentage of re-incarcerated misdemeanor probationers." (Respondent's Brief at 19.) Consequently, as Shelton also admits, he is merely speculating that it "seems reasonably certain" that "many of these incarcerated probationers had no counsel." *Id.* at 18. Shelton fails to support his position that the statistics verify his opinion.

Information obtained from the Alabama Administrative Office of Courts, which is displayed below, evinces the minimal risk that a misdemeanor defendant in Alabama would suffer "actual imprisonment."[3]

	1998	1999	2000	2001[4]
Total misdemeanors	116, 227	114, 951	116,092	78,048
Placed on probation	26, 504	25,707	26, 208	15,084
Revocations	787	388	340	52

Of the total number of misdemeanor defendants placed on *supervised* probation in Alabama, between one to three percent have their probation revoked. A misdemeanor defendant placed on *unsupervised* probation, such as Shelton, faces an even more remote possibility of

[3] The Alabama Administrative Office of Courts compiles its information based solely on the number of misdemeanor defendants released under supervised probation, as opposed to those, like Shelton, who are released on unsupervised probation.

[4] The Alabama Administrative Office of Courts collects its data based on its fiscal year. The 2001 information encompasses data ranging from October 1, 2000 through August 31, 2001.

revocation because he is not subject to regular scrutiny by a probation officer.

None of this suggests that courts are rendered powerless to enforce their probation orders. Contrary to Shelton's arguments, trial courts can employ various remedies without activating the probated sentence to ensure compliance with the terms of probation. Among the tools available to the trial court — should Shelton violate the terms of his probation by, for example, assaulting the victim again — are the imposition of supervised probation, requiring regular meetings with a probation officer, prohibiting contact with the victim, and ordering the payment of additional fines. ALA. CODE §§ 15-22-52 & 54(d) (1995).

Moreover, every Alabama court, like federal and other state courts, possesses the power of contempt to "compel obedience to its judgments, orders and process[.]" ALA. CODE § 12-1-7(3) (1995);[5] *see Young v. United States*, 481 U.S. 787, 795 (1987) ("[T]he power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law. It is essential to the administration of justice." (quoting *Michaelson v. United States ex rel. Chicago*, 266 U.S. 42 (1924))). The trial court has the authority to hold Shelton in "constructive contempt"[6] for failing to pay his financial

[5] Section 12-1-7(3) provides that "[e]very court shall have power . . . [t]o compel obedience to its judgments, orders, and process and to orders of a judge out of court, in an action or proceeding therein[.]"

[6] If Shelton refused to comply with "a court's lawful . . . order, rule, or command[] [and] the dominant purpose of the contempt proceeding [was] to punish" him, the court could cite Shelton for criminal contempt. Ala. R. Crim. P. 33.1(b)(3)(b). Whereas, if the "court's . . . order, rule, or command[] . . . by its nature [was] still capable of being complied with[,]" the court could cite Shelton for civil contempt. Ala.

levies or for violating a term of his probation. Ala. R. Crim. P. 33.1(b)(2) (defining "constructive contempt"); *Little*, 693 So. 2d at 31 (trial court possesses "authority to conduct . . . contempt proceedings . . . in its attempt to collect the unpaid fine" imposed for defendant's misdemeanor crime).

During contempt proceedings, Shelton would receive the full panoply of due process as required by this Court in *Cooke v. United States*, 267 U.S. 517, 537 (1925) (during prosecution of contempt, accused must be "advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation . . . includ[ing] the assistance of counsel, if requested, and the right to call witnesses to give testimony"). He would be entitled to written notification describing the particular conduct constituting contempt of court and instructing him to appear at a particular time to show cause why he should not be punished. Ala. R. Crim. P. 33.3(b). Next, he would receive a hearing, "set so as to allow a reasonable time for the preparation of the defense" during which he would be "afforded the opportunity to present exculpatory evidence and evidence of mitigating and extenuating circumstances[,]" as well as "subpoena witnesses" and, most significantly for the argument advanced here, to "*be represented by counsel*[.]" *Id.*(d) (emphasis added). A sentence would then be "pronounced in open court, in [his] presence . . . not later than the latter of seven days after completion of all proceedings[.]" *Id.*(e). The maximum penalty faced would be a $100 fine and five days' imprisonment. ALA. CODE § 12-11-30(5) (1995). Proceeding under its contempt powers, the trial court would not violate Shelton's Sixth

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R. Crim. P. 33.1(b)(4). Regardless of the violation, Shelton would be subject to similar punishments.

Amendment right to counsel, yet the court would retain ample authority to enforce the terms of Shelton's probation.[7]

III. SHELTON'S REQUEST THAT THIS COURT OVERRULE *ARGERSINGER* AND *SCOTT* IS IMPROPER.

This Court should decline Shelton's alternative invitation to overrule *Argersinger* and *Scott* because he did not request that relief in a timely manner. In his Brief in Opposition, Shelton affirmatively embraced the continuing validity of *Argersinger* and *Scott*. Indeed, Shelton assumed the legitimacy of these cases and argued, relying on their holdings, that *Argersinger* and *Scott* did not "limit the right to counsel in misdemeanor cases to immediate imprisonment cases but extend[ed]

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[7] Both federal and some state trial courts have similar powers of contempt. 18 U.S.C. § 3663(g) (2001) ("If such defendant [under the Victim and Witness Protection Act] is placed on probation or sentenced to a term of supervised release under this title, any restitution ordered under this section shall be a condition of such probation or supervised release. The court may revoke probation or a term of supervised release, or modify the term or conditions of a term of supervised release, or hold a defendant in contempt . . . if the defendant fails to comply with such order."); ILL. REV. STAT. ch. 730, § 5-9-3 (Smith-Hurd 2001) ("An offender who defaults in the payment of a fine or any installment [imposed for his criminal offense] may be held in contempt and imprisoned for nonpayment"); IOWA CODE ANN. § 910.4(1)(b) (West 2001) (under the victim restitution law, "[i]f an offender fails to comply with restitution requirements during probation, the courts may hold the offender in contempt, revoke probation, or extend the period of probation"); *Ellis v. State*, 821 S.W.2d 56, 57 (Ark. Ct. App. 1991) (ruling that trial court properly declined to revoke defendant's suspended sentence and held defendant in criminal contempt for failing to pay restitution under Arkansas Hot Check Law, a class C felony).

the protection to cases where there is a sentencing to a term of imprisonment or a deprivation of personal liberty." (Respondent's Brief in Opposition at 4) Absent "notice of an intent to make so far-reaching an argument" in his previous filing, this Court must refuse to "entertain [Shelton's] invitation to . . . abandon . . . longstanding" precedent because he "did not make clear [he] intended to make this argument until [he] filed [his] brief on the merits." *South Cent. Bell*, 526 U.S. at 170–71; *see also* Sup. Ct. R. 15.2; *Kolstad*, 527 U.S. at 553 ("It is not this Court's practice to consider arguments — specifically, alternative defenses of the judgment under review — that were not presented in the brief in opposition to the petition for certiorari.").

This Court granted certiorari limited to the question whether, "[i]n the light of the 'actual imprisonment' standard established in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and refined in *Scott v. Illinois*, 440 U.S. 367 (1979), . . . imposition of a suspended sentence or conditional sentence in a misdemeanor case" invokes the Sixth Amendment right to appointed counsel. Shelton's argument in support of overturning thirty years of precedent is not "fairly included" in evaluating the applicability of the Sixth Amendment to probationary sentences and, therefore, is not "'predicate to an intelligent resolution' of the question presented" in the State's brief. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996). This Court has not requested that the parties exceed the basis for certiorari to brief the issue; therefore, no further evaluation of Shelton's contention is warranted. *Payne v. Tennessee*, 498 U.S. 1080, 1080 (1991) (where this Court specifically requested the parties "brief and argue" whether its prior precedent "should be overruled").

Notwithstanding the procedural barriers that counsel against reaching Shelton's argument to overrule *Argersinger* and *Scott*, Shelton has not provided any persuasive basis for reconsidering those cases. Far from challenging the reasoning underlying those rulings, for thirty years this Court has adhered to and built on their holdings. (Petitioner's Brief at 12–14) When this Court in *Argersinger* and *Scott* refused to depart any further from the text of the Sixth Amendment, this Court crafted a meaningful and practical rule that would "not . . . affect[] . . .[t]he run of misdemeanors[.]" *Argersinger*, 407 U.S. at 40. This consistent line of reasoning has guided the great majority of federal and state appellate courts to deny the appointment of counsel in misdemeanor cases involving probationary sentences.[8]

IV. THE PRETRIAL DETERMINATION WHETHER TO APPOINT COUNSEL DOES NOT PREJUDICE A JUDGE IN THE LATER EXERCISE OF HIS RESPONSIBILITIES AT TRIAL.

Although Shelton complains that a trial judge would "pre-judge . . . the case" (Respondent's Brief at 25, 29–31), to determine whether a misdemeanor defendant is entitled to counsel, this issue has already been addressed in *Argersinger*:

> Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even

[8] The Second, Fourth, Fifth, Sixth, and Eleventh Circuits, as well as numerous state supreme and appellate courts, have reasoned that probationary sentences do not invoke the Sixth Amendment right to counsel. *See* Petitioner's Brief at 16–19; States' Amicus Brief at 23 ("[M]any States have not gone beyond the minimum federal requirements imposed by this Court's decisions.").

> though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts.

407 U.S. at 40. In contrast to the public policy argument offered by Shelton, this Court made clear in *Argersinger*, 407 U.S. at 38, that, under Article III, it does "not sit as an ombudsman to direct state courts how to manage their affairs but only to make clear the federal constitutional requirement."

Shelton fails to explain how the pretrial inquiries of the court to determine the need for counsel are unusual and unfairly prejudicial. Judges routinely evaluate the nature of a defendant's conduct and his criminal record before trial in deciding, for example, whether to grant pre-trial bond, in evaluating whether probable cause exists at a preliminary hearing, and in considering the defendant's competency or sanity. This Court has never presumed that these important pretrial inquiries interfere with a judge's ability to preside at trial in a fair and impartial manner. In addition, Shelton ignores the role of prosecutors, who are cognizant of the appropriate punishment for the crime and have a duty to notify the trial court of the need for counsel when the State intends to request imprisonment if a conviction is obtained. With open lines of communication, trial judges can effectively determine the prospect of imprisonment and the need for counsel.

In any event, the *Argersinger* pretrial inquiry only serves to protect and benefit the defendant. *See* States' Amicus Brief at 8–9. If a court prefers to preserve the option of actually incarcerating a defendant who eventually is found guilty, the defendant must be informed of his right to appointed counsel. If, however,

the court chooses not to make counsel available, the court loses the incarceration option. Whatever the outcome, the defendant remains fully protected.

V. A FURTHER DEPARTURE FROM THE TEXT OF THE SIXTH AMENDMENT WOULD CAUSE ALABAMA AND OTHER STATES TO SUFFER UNWARRANTED COSTS FOR THE PROVISION OF COUNSEL IN MISDEMEANOR CASES OF PROBATION.

The issue presented in this case is not, as Shelton would have it, whether states have an "expense" defense once a constitutional right has been established. To the contrary, the pertinent question is whether there is a Sixth Amendment right to state-funded counsel under the circumstances of this case. As shown in the State of Alabama's opening brief and above, there is no such right. While states, through their elected officials, are free to enact state laws that fund a right to appointed counsel in excess of the constitutional minimum, they should not be required to do so where the Constitution imposes no such obligation. Given the clear rule set forth in *Scott*, it should be left to the states to determine the proper scope of the right to state-funded counsel beyond that required by the Sixth Amendment. *See also* States' Amicus Brief at 22–28.

In evaluating the necessity of appointed counsel under the Constitution, this Court in *Scott* recognized that the costs to the states in providing indigent representation must be weighed in the light of the severity of the sentence imposed. This Court concluded that the gravity of actual incarceration in a misdemeanor case requires the appointment of counsel. *Scott*, 400 U.S. at 372–73 (explaining that the *Argersinger* court rejected a "social

cost" argument "because of the Court's conclusion that incarceration was so severe a sanction that it should not be imposed . . . unless an indigent defendant had been offered appointed counsel"). The *Scott* Court then drew a clear line: "*Argersinger* has proved reasonably workable, whereas any extension would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse states." *Id.* at 373; *see also Argersinger*, 407 U.S. at 49 ("[w]here the possibility of a jail sentence is remote . . . the costs of assistance of counsel may exceed the benefits") (Powell & Rehnquist, JJ., concurring).

The State of Alabama possesses limited resources to supply counsel for indigent defendants.[9] Although those costs may be tolerable in some states, the appointment of counsel for misdemeanor probationary offenders in Alabama would divert scarce resources from more serious criminal cases and other priorities of the criminal justice system. It would congest the courts, delay their provision of justice, and undermine the antirecidivism policies of the states. Principles of federalism strongly support the

[9] Although other states may provide a greater right to counsel predicated "on their own constitutions or public policy," *Nichols*, 511 U.S. at 748 n.12, the right to counsel under Alabama law is founded on the guarantee contained in the Sixth Amendment to the United States Constitution. Ala. R. Crim. P. 6.1 commentary at 36 ("The basis of Rule 6.1 is the right of a criminal defendant under Art. 1 § 6, Alabama Constitution of 1901, and the Sixth Amendment to the United States Constitution to be represented by counsel in all criminal prosecutions."); *Ex parte Shelton*, No. 1990031, 2000 WL 1603806 (Ala. May 19, 2000) (predicating its decision to require counsel based on "the rationale of *Reilley*, *Argersinger*, and *Scott*"); *see also Ex parte State*, 783 So. 2d 103, 106 (Ala. 2000) (in adopting the *Nichols* standard to allow enhancement of a later conviction with a prior uncounseled conviction for driving under the influence of alcohol, the court reasoned that, "under the circumstances presented ... the Alabama Constitution does not afford a defendant greater due-process protections than the Federal Constitution").

continued freedom of the states to manage their scarce judicial resources, as they deem appropriate, in cases of misdemeanors where the defendants suffer only probation, not actual imprisonment. A further departure from the text of the Sixth Amendment is, therefore, unwarranted.

CONCLUSION

The judgment of the Supreme Court of Alabama should be reversed.

Respectfully submitted,

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